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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 CENTER FOR CONSTITUTIONAL
5 RIGHTS,

6 Plaintiff,

7 v.

12 CV 135 (NRB)

8 DEPARTMENT OF DEFENSE, et al.,

9 Defendants.
10 -----x

11 New York, N.Y.
12 September 3, 2013
13 10:30 a.m.

14 Before:

15 HON. NAOMI REICE BUCHWALD,

16 District Judge

17 APPEARANCES

18 GIBBONS P.C.

Attorneys for Plaintiffs

19 BY: LAWRENCE LUSTBERG
20 BENJAMIN YASTER

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United States Attorney for the
Southern District of New York

22 BY: EMILY DAUGHTRY

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23 ALSO PRESENT: MEGAN WEIS
24 SHAYANA KADIDAL
25

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(In open court)

LAW CLERK: This is the Center for Constitutional Rights versus Department of Defense, 12 Civ. 135.

Is the plaintiff present and ready to proceed?

MR. LUSTBERG: Yes, Lawrence Lustberg from Gibbons P.C. on behalf of plaintiff Center for Constitutional Rights.

LAW CLERK: Is the defendant present and ready to proceed?

MS. DAUGHTRY: Yes, Emily Daughtry, assistant United States attorney for the government.

MS. LaMORTE: Tara LaMorte, assistant United States attorney for the government.

MS. DAUGHTRY: Your Honor, we also have Megan Weis, who is an associate deputy general counsel of the Department of Defense.

THE COURT: She was hiding back there.

All right. I thought that a useful structure this morning would be to give the Center for Constitutional Rights the opportunity to respond to the government's reply memorandum, since they sort of got the last written word.

As you know, I gave you quite a number of extra pages over my usual page limit. You should assume with confidence that your papers have been read carefully, so pure repetition would not be particularly valuable. But I think, as I say, a good way to begin is to let the Center sort of have a surreply

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1 and then I will give the government a sur surreply.

2 MR. LUSTBERG: Thank you, your Honor, may it please
3 the Court. I absolutely will not repeat what's in the
4 voluminous papers here. I think the Court has available to it
5 a pretty extensive record and one in which the parties were
6 fairly well engaged with each other in terms of going back and
7 forth, so hopefully you have the benefit of all of our thinking
8 on most of the issues.

9 I'm more than happy to respond to the government's
10 reply. I think it bears noting that there's really a few
11 themes that pervade all of what we talk about here. But before
12 I get into those, I'm sure that your Honor is well aware of the
13 background of all this that Mr. al Qahtani was detained and
14 questioned.

15 THE COURT: I did read the coverage in the Washington
16 Post and Time magazine. Those were six or eight pages each.

17 MR. LUSTBERG: Right. And then what else was in our
18 appendix, as the Court may recall, is a lot of the official
19 government-type publications, various reports from Congress and
20 from the administration, press releases from the Department of
21 Defense that stand for the proposition largely -- and we relied
22 upon this in different respects at different times throughout
23 our papers -- for the fact that a lot of the information that
24 we're seeking is in a sense -- or what I should say is the
25 government's response to our request for that information

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1 really turns on the logic or plausibility of particular
2 arguments that they make.

3 Let me back up. There's a fundamental, in some ways,
4 disconnect between the two sides. Of course we argue that the
5 Freedom of Information Act is very important salutary remedial
6 legislation that should be liberally construed to effectuate
7 its purposes, that is to say openness in government is a good
8 thing, so therefore the exemptions to FOIA should be narrowly
9 construed. The government, as always occurs, and we have all
10 done a lot of these cases, typically responds by saying no, you
11 need to balance the public interest in keep things secret with
12 the purposes of the Freedom of Information Act. And they
13 always emphasize in these contexts, that is the national
14 security context in particular, that great deference should be
15 paid to the statements of government officials in the various
16 declarations that have been submitted.

17 As the dance goes, we then cite those cases that stand
18 for the proposition that deference is one thing and
19 acquiescence is another, and that under the Freedom of
20 Information act this Court has a very important role to play,
21 and it should perform that role by evaluating the declarations
22 that the government has submitted both for their sufficiency --
23 and that's very important in this case, as to whether or not
24 what they have said is enough for your Honor to go on -- and
25 with respect to their legal adequacy.

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1 We make both of those sets of arguments throughout our
2 papers. But at the end of the day, all of that deference that
3 is supposed to be paid to government officials in the national
4 security context comes down to really two words that we all
5 agree on, which is are there statements about the potential
6 evils that would come about should the materials we wish be
7 disclosed to us, are their arguments logical and plausible.

8 Interestingly, this Court, of course, has presumably a
9 great deal of experience with the word "plausible," which when
10 we first started doing FOIA litigation wasn't such a term of
11 art, but after *Twombly* and *Iqbal* is now a part of all pleading.
12 And we know that the plausibility means something; it's not
13 something that is just satisfied by any old statement. And
14 largely our arguments today and our papers go to the
15 plausibility of the government's arguments with regard to each
16 of the issues.

17 Now I would like to focus, as the government does in
18 its papers, upon two of those issues, one of them is the
19 exemption one claims, and the other is the exemption 7(a)
20 claims. And just to remind the Court what we're talking about
21 here in terms of actual materials, there's no question but as
22 to the fact that there are materials out there that satisfy or
23 that respond to the request that CCR has made. There are 53
24 videotapes of Mr. al Qahtani in his cell and interacting with
25 DOD personnel. And that's as much as we know about those

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1 items. We understand that the government has submitted an in
2 camera -- made an in camera ex parte submission that may
3 describe them in greater detail. Obviously we do not have
4 access to that and don't know what is said there, and I will
5 have a little more to say about that, perhaps, later. But they
6 do tell us in their most recent submission that those items --
7 that the description of those do not depict any abuse of
8 Mr. al Qahtani. And that's important because it goes to some
9 of our logic and plausibility concerns.

10 In addition to those 53 videotapes, there are six mug
11 shot photos of Mr. Albany that the government quite frankly --
12 and particularly when you asked me to respond to their last
13 submission -- hardly discusses, and at least as I read it,
14 doesn't vigorously oppose our obtaining. There's not a lot of
15 discussion of how those -- the release of those six mug shot
16 photos would fulfill any of the purposes that the government
17 sees for non-disclosure, or more to the point, any of the
18 elements of the particular exemptions at issue. Then there's a
19 video of two forced cell extractions which we'll discuss and
20 then two videos of intelligence debriefings.

21 I just lay that out by way of sort of a structure of
22 what it is that we're looking for.

23 So let's talk about exemption one. The Court is well
24 aware of the elements of exemption one, which provides that
25 materials that are properly classified in the interest of

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1 national security, hereunder executive order 13,526, need not
2 be turned over so long as they were classified, as I said, were
3 done under the control or owned or produced by the government,
4 which they were here, in which the classification authority
5 determined that disclosure would result in damage to national
6 security, and describes it in appropriate detail that it has to
7 fall within the eight categories. Here there are three of them
8 at issue. It can't be the purpose of the government's actions
9 in not disclosing them cannot be to conceal violations of law
10 or to prevent embarrassment. And that's important to
11 atmospherics to this case, although we don't argue it as our
12 primary basis for disclosure.

13 Here I would like to address the particular concerns
14 that you asked me to -- that the government raises and attempt
15 to persuade your Honor that they don't satisfy these standards.

16 First, the government expresses the concern that if
17 Mr. -- if these various images are disclosed, that they will
18 reveal that Mr. al Qahtani is detained at Guantanamo and that
19 he and his family will therefore be subject to reprisals. We
20 contend, as your Honor I think knows, and I would respond to
21 their last submission in this regard by saying that simply is
22 not logical or plausible. And it is not logical or plausible
23 for several reasons.

24 First, many of these records -- and this really is
25 first -- say absolutely nothing that would cause anybody to be

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1 concerned about reprisals, or to put it another way, the
2 concern that they would reveal that Mr. al Qahtani is
3 cooperating with the authorities is really misdirected with
4 regard to those images. That is, what about the mug shots
5 shows that he's cooperating? What about his cell behavior
6 would show that he's cooperating so therefore he should be
7 concerned about reprisals? Many of these images say absolutely
8 nothing, at least as insofar as they're described to us. And
9 we're reliant upon those descriptions for the purpose of
10 today's proceedings. None of them have anything to do with
11 cooperation and ought not give rise to any concern that there
12 would be reprisals against him for cooperating with the U.S.
13 authorities.

14 Even much more to the point, the Department of Defense
15 itself has made a huge amount of information about
16 Mr. al Qahtani publicly available beyond the Time article and
17 the Washington Post article that your Honor alluded to. We
18 know from government disclosures that Mr. al Qahtani is in
19 captivity at Guantanamo. We know when he was captured. We
20 know how. We know a great deal about the mistreatment to which
21 he was subjected. And most significantly, in a Department of
22 Defense release that's one of our exhibits and in other
23 materials that we provided to the Court, we know that the
24 government has been saying that he's been cooperating with them
25 and that they got valuable intelligence from him.

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1 We don't necessarily accept that as truth, but it's
2 incredibly disingenuous for the government to make available to
3 the world facts that would indicate that Mr. al Qahtani
4 cooperated and then say they shouldn't release additional
5 information to us, whether or not that information depicts his
6 cooperation, because it will reveal that he's cooperating and
7 there could be reprisals against him and his family. If when
8 were reprisals -- and by the way, there's been no evidence that
9 there has been, notwithstanding those releases by the
10 government, then -- well, let me back up. If anybody was going
11 to do it, they would know. If there was going to be reprisals,
12 they could do it based upon the information that the government
13 itself made available.

14 And let me, in that regard, respond directly to
15 something that the government says in its final submission.
16 One of the things that they take us to task for is they say
17 we're essentially arguing that the government has waived its
18 right to claim this exemption with regard to these materials,
19 and that there is no such waiver because these materials
20 themselves have never been put out there in the public for
21 public consumption.

22 Our argument here is absolutely -- and it's very
23 important to me that your Honor understands the argument.
24 We're not arguing waiver. I argued waiver before courts in
25 FOIA cases before. It is not a waiver argument. It could not

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1 be. And the reason it can't be is because they're right, these
2 particular items are not in the public sphere. But the fact
3 that the government has revealed the facts that it has already
4 is evidence that goes to whether their claim that we all should
5 be concerned -- that your Honor should be concerned about
6 reprisals is a logical and plausible claim.

7 I think, your Honor, the take away from all that is
8 that prism of logic and plausibility is the prism through which
9 you should examine each of the government's arguments. If
10 necessary, you can examine the images yourself in camera. The
11 law is pretty clear that in camera review is no substitute for
12 adequate showing by the government and so forth, but in
13 assessing logic and plausibility, it is important to look at
14 them to see whether it makes sense, it makes good common sense
15 in light of the claim that the government has made, this first
16 claim being that there will be reprisals for Mr. al Qahtani's
17 cooperation.

18 The second claim that they make is that releasing the
19 photos will dissuade current and future detainees from
20 cooperating. The problem with that argument is that the
21 government has in the past already released photos of
22 detainees, and in our papers we have provided those to the
23 Court. They have allowed both the AP and the Red Cross to
24 photograph detainees. They have declassified, in the context
25 of other litigation and otherwise, other photos of detainees,

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1 and most significantly, in some ways Mr. al Qahtani has
2 consented.

3 And so to the extent -- and that consent is important
4 here because --

5 THE COURT: How could you argue that?

6 MR. LUSTBERG: Pardon me?

7 THE COURT: How could you argue his consent was given?
8 As I understand it, you've brought the habeas proceeding to a
9 halt because he is incompetent.

10 MR. LUSTBERG: A couple of aspects of that, your
11 Honor, that you should know. His consent was well before all
12 those applications with regard to competency.

13 THE COURT: If he really consented to this request,
14 why didn't you get it in writing?

15 MR. LUSTBERG: We -- there's a couple of reasons that
16 we didn't. We certainly can.

17 THE COURT: Now you can't. I mean I couldn't take a
18 plea from him. I couldn't take -- there can't be a knowing
19 waiver at this point or knowing consent.

20 MR. LUSTBERG: I think that's right today. That was
21 not right as of the time that he consented. And Ms. Babcock,
22 who submitted a certification to that effect and met with him,
23 was persuaded that that was a knowing and voluntary consent to
24 going forward.

25 THE COURT: I'm not questioning her honesty, but you

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1 can't -- you do have the problem that we all recognize of his
2 inability now to give consent. And moreover, I think the other
3 issue would be that at the time that you say he gave consent
4 I'm not sure that he knew what he would be consenting to.

5 MR. LUSTBERG: Respectfully, your Honor, I was there
6 for one of the interactions, and it's not appropriate -- it may
7 not be appropriate for me to act as a witness in any event, but
8 the particular claim of competence that was made in the course
9 of the habeas proceeding and that, you're correct, has caused
10 it to come to a fundamentally halt in a stay situation, was
11 based upon the fact that he was unable to assist with his own
12 defense and could not understand the nature of those
13 proceedings against him.

14 The question of his understanding that we were seeking
15 the release of information regarding his treatment was a
16 different thing. That was fully explained to him, and counsel
17 believed that he consented at that time knowingly and
18 willfully. There's really no law that requires that he do so
19 in person.

20 THE COURT: There's actually also no law that -- his
21 consent would be a plus for you, but it is not a requisite, I
22 think we all agree.

23 MR. LUSTBERG: Absolutely. It goes -- again, it's a
24 single data point that goes to the logic and plausibility of
25 the government's concerns. It's more pertinent to some of

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1 their arguments than others. So for example, when they argue
2 their respect for the Geneva Conventions and the notion that
3 the United States should be viewed as in compliance with the
4 Geneva Conventions so as not to create a public curiosity of
5 Mr. al Qahtani, his consent is somewhat significant to that,
6 and perhaps not as significant as evaluating the logic and
7 plausibility of that argument given the government's conduct in
8 this case, which seems to be so far afield from what the Geneva
9 Contention intended. So you're right, there are other data
10 points that your Honor can consider in deciding this matter.

11 But nonetheless, his consent is a data point, and the
12 amount of weight that your Honor puts on it, given the other
13 circumstances, including the claim of incompetence and the fact
14 that it was a third-party consent.

15 And on the other side, to be fair, one of the things
16 that the government argues is that he refused to consent to be
17 photographed by the ICRC. True. Very different circumstances.
18 We are not in a position to comment on why he did that. But
19 the fact that he didn't want the ICRC to take a picture of him
20 to send to his family doesn't really bear on, respectfully,
21 whether he knowingly and voluntarily consented to the
22 treatment, the facts pictured regarding the treatment that he
23 endured being made public.

24 THE COURT: Go on.

25 MR. LUSTBERG: One of the issues I would like to

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1 address is the contention in the government's declarations that
2 the release of certain of these pictures would endanger the
3 lives and physical safety of American citizens and allies
4 because in the past violence has erupted when other photos were
5 disclosed. And the government points to photos from Abu
6 Ghraib, abuse of the Koran, of a Marine urinating on Taliban
7 corpses and the like.

8 But in that most recent submission, the submission
9 that your Honor has asked me to respond to, the government
10 specifically characterizes the ex parte declaration that they
11 submitted to the Court -- and again, we don't know what it says
12 other than that characterization -- as one that does not depict
13 abuse of Mr. al Qahtani. That being so, it's hard to
14 understand why those particular photos, or at least those
15 photos on those videos that do not depict abuse, would cause
16 the kind of response that the government cites in particular
17 response to really outrageous atrocities.

18 So the government is left to argue well, who knows how
19 they could be spliced or edited, and they could be spliced or
20 edited by somebody in a way that would cause exactly that kind
21 of response and thereby endanger U.S. troops and allies. But
22 that's a logic that fails the logic and plausibility argument
23 because it sweeps way too broadly. People could make up
24 pictures and put them out there. We see video games that are
25 unbelievably realistic. Any picture, any image could be

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1 tampered with, could be altered in a way to make it look more
2 outrageous than it is. So that theory has essentially no
3 limiting principle. It not only would preclude the release of
4 any photograph, but it would preclude the release of tons of
5 information that could be made to appear to be something that
6 it isn't, a skill that frankly my teenage son has mastered very
7 well when it comes to, for example, parents' signatures on
8 report cards. It's not hard. You should see how well my kids
9 could forge my signature.

10 THE COURT: I was hoping to see how good the report
11 cards were.

12 MR. LUSTBERG: If the report cards were good, they
13 would not have to forge my signature.

14 I have just a quick note on the ex parte submissions.
15 We agree that in many cases ex parte submissions are
16 appropriate. There's obviously a cost to ex parte submissions
17 in the sense that it denies us the opportunity to really
18 respond to the arguments that are typically contained, at least
19 even if they're factual, between the lines of such submissions,
20 and it deprives the Court of the opportunity to subject any
21 such contentions to the adversarial process. And that's why
22 the standard is that ex parte submissions by the government in
23 support of FOIA exemptions should only be allowed where quote,
24 unquote, absolutely necessary.

25 Here, your Honor, we have contended that it's just

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1 unfair, given the fact that we ourselves were not permitted to
2 make an ex parte submission, or a sealed submission at least,
3 ourselves. As the Court --

4 THE COURT: Because you were barred by another judge.

5 MR. LUSTBERG: We were barred by another judge based
6 upon her reading of FOIA, which was really not before her, and
7 based on her assessment of this Court's quote, unquote, need to
8 know.

9 We think it would be appropriate for your Honor,
10 sitting as the Freedom of Information Act in this case, to take
11 another look at that ruling. She's not really construing the
12 protective order before her, as to which I would never say this
13 Court should second guess that at all, but as to her assessment
14 of your need to know, I think that's the kind of thing that you
15 can consider.

16 THE COURT: She assessed under her protective order
17 what you were permitted to do with the information that you
18 received under the protective order and said you could not rely
19 on that in this case. So I think Judge Collyer --

20 MR. LUSTBERG: Yes, Judge Collyer.

21 THE COURT: -- was construing her own protective
22 order.

23 MR. LUSTBERG: Respectfully, Judge, if you read her
24 ruling, what her ruling is is that that is so because she
25 doesn't see any possible need to know that this Court would

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1 have with regard to our arguments. That is her ruling in the
2 record, you have that. If you read her ruling, it's not really
3 where she's looking at the protective order and construing
4 certain language, what she is saying is in a Freedom of
5 Information Act case this Court would have no need to know.
6 And that might be true in some cases.

7 THE COURT: Let me just share something with you and
8 maybe it will -- well, on one level it will give you comfort,
9 on another other level, probably not.

10 I was not at work last week. At least I was not in
11 the office, I was at work in substance. I also am a commuter
12 and do a great deal of my reading on the train. Consequently,
13 I do not walk out of the office with ex parte submissions. I
14 surely do not leave with classified documents. So actually I
15 was unable or constrained to read all the papers in this case
16 without seeing either the ex parte submission or seeing the
17 classified submission. I saw them for the first time today.
18 So actually I can attest that I could evaluate this case and
19 did without seeing that stuff. So I actually do have a split
20 brain on that. So that, as I say, it may give you comfort, it
21 may not, but I didn't find it essential.

22 MR. LUSTBERG: I understand. Just one other point
23 with regard to the exemption one argument to respond to the
24 government's most recent submission, and that has to do with
25 the forced cell extractions. Because clearly, those are on a

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1 different -- it's a different sort of thing than mug shots on
2 the one hand and the 53 images of Mr. al Qahtani in his cell
3 and quote, unquote, interacting with DOD personnel on the
4 other. At least one court has held, and it's Judge Bates, in
5 the cases that -- series of cases that were cited by both
6 parties, that those four cell extractions are properly withheld
7 under exemption one.

8 The record that we have created, though, your Honor,
9 we think required this Court to take a fresh look at those
10 issues. In particular, in the record before you are lots and
11 lots of previous disclosures about these so-called FCEs,
12 including the procedures that are used, photographs that the
13 Department of Defense has released regarding them, and other
14 information regarding forced cell extractions.

15 It's in light of those that we ask this Court to
16 assess the logic and plausibility of the government's arguments
17 that these particular FCE videotapes, or this one videotape
18 with two instances, should not be disclosed. And we would also
19 ask that this Court take a good look at the particular
20 government rationale that it offers for not disclosing the FCE
21 videotape. Really they talk about two things, one is that it
22 would encourage future detainees to resist forced cell
23 extractions because if these are revealed then it would -- one
24 would know that in resisting you may become a hero to the world
25 when that becomes public or something like that.

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1 But it's an extraordinary argument, because what it
2 counts on is the idea that when somebody is deciding whether to
3 resist being taken from their cell, that what they're going to
4 be resisting for is not because they don't want to leave their
5 cell, not because they may hate their captors or whatever the
6 other reason is, not because they're scared or some other
7 reason, it's just because sometime down the road, after years
8 of Freedom of Information Act litigation or whatever, that
9 those particular videotapes would be revealed to the public.

10 It's really -- it's almost absurd, but certainly
11 doesn't satisfy a logic and plausibility, and particularly a
12 plausibility standard, any more than does the government's
13 other contention with regard to this, which is if this Court
14 were to require these videotapes to be disclosed, then it, the
15 government, would cease videotaping them, or would tempt the
16 government, I take it, to cease videotaping them in the first
17 place. That is, the government says you should not order these
18 disclosed because if you do, then the Department of Defense may
19 take the position ultimately that it's a bad idea to videotape
20 them, even though it's in the public interest, they say, to do
21 so both as a training matter, as a matter of documenting what
22 occurred, and for other salutary public reasons. That strikes
23 me as an argument that is a little scary to hear it made, but
24 in any event, certainly doesn't pass the logic and plausibility
25 test.

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1 I want to spend a few minutes on the exemption 7(a)
2 issue, because that's the other issue that the government
3 spends a good deal of time on in their final submission. As
4 you know, your Honor, exemption 7(a) pertains to records or
5 information that is compiled for law enforcement purposes.
6 That's prong one. And prong two is that production of which
7 could reasonably be expected to interfere with law enforcement
8 proceedings.

9 We do not dispute, so that maybe this makes things a
10 little easier, the first prong. We do dispute the second
11 prong. That is, we do not dispute these materials were
12 gathered for law enforcement purposes. There's a dispute
13 between the parties, a legal dispute, as to what has to be
14 particularized here. But I want our position to be clear, we
15 agree with the government that a document-by-document showing
16 of whether a particular -- any one of those documents could
17 reasonably be expected to interfere with law enforcement
18 proceedings is not necessary, that it could be done, as the
19 government says, by categories.

20 But that doesn't mean that the showing can be a
21 conclusory one, that is to say, for example, let's take the mug
22 shots, or better even than that, let's take the 53
23 pre-interrogation videos. The government says that those are
24 videos of, quote, activities in Mr. al Qahtani's cell as well
25 as interaction with DOD personnel. That's the description that

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1 they provided. That's the description upon which the Court is
2 asked to rely in deciding whether their release could
3 reasonably be expected to interfere with law enforcement
4 proceedings.

5 It's way too conclusory. The notion that those videos
6 with that description could somehow interfere or reasonably be
7 expected to interfere with law enforcement proceedings is --
8 the logic of it is elusive. The plausibility of it is
9 impossible to ascertain.

10 So in particular, what they say is it might bear on
11 any of Mr. al Qahtani's claims or defenses. When I say "they
12 say that," your Honor, that's in their brief. We have not seen
13 any declarations from anybody that says that the reason that
14 the way in which the release of those 53 videos and those mug
15 shots, for example, would -- that the way in which they would
16 interfere with ongoing law enforcement proceedings is because
17 they would bear on any claims or defenses. The government says
18 it in their brief, and what they say is that, for example, it
19 might bear on his claims of voluntariness with regard to
20 various statements that he made. The Court will recall that
21 statement from their brief.

22 And their concern is that what will happen is he'll
23 get a heads up that that is -- from something about that, and
24 will tailor his arguments to that evidence. Leaving aside what
25 the evil is with tailoring one's arguments to actual evidence

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1 in a case, certainly a disturbing notion that there's something
2 wrong with that, in this case, Mr. al Qahtani has, since the
3 beginning of his habeas, at least, has clearly challenged the
4 voluntariness of his statements. So it's not like he's
5 creating arguments as a result of what's on videotapes that he
6 hasn't seen. And so that argument seems to me to be one that,
7 again, failed the logic and plausibility test, as does the
8 argument that they make that somehow the evidence could be
9 manipulated by the defense.

10 We're not asking for originals. The government would
11 retain the original videotapes, audio tapes, mug shots,
12 whatever. So to the extent that Mr. al Qahtani or his defense
13 team somehow wanted to quote, unquote, manipulate the evidence,
14 it would be literally impossible to do. The claim, which is in
15 their declarations, is -- maybe I was too harsh when I said in
16 one of our briefs that it was silly, but it strikes me as
17 completely defying common sense, and common sense, in a way, is
18 what the logic and plausibility standard is all about.

19 Equally bereft of force is the government's argument
20 that the release of these materials would somehow influence
21 military commission members should this matter ever proceed to
22 a hearing. That assumes that there would be a hearing,
23 something that, as the Court knows, didn't happen the last time
24 because the convenor refused to convene a military commission
25 because of the torture to which Mr. al Qahtani has been

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1 subjected. But even assuming there was a military commission,
2 it assumes that commission members, who are not like lay
3 jurors, would not follow the instructions of the Court to only
4 consider the evidence that was before them, for example. It
5 assumes they would be prejudiced by these materials even after
6 themselves having been subjected to perhaps the Time magazine
7 article or the Washington Post article or any other materials
8 about this case. It is a claim that is like the government's
9 other claims in this matter, which is no matter how much
10 deference you pay to the declarations before you simply doesn't
11 pass a common sense test.

12 The main government argument in their final submission
13 with regard to this issue is that it would -- that providing
14 these materials to Mr. al Qahtani, to the world, would provide
15 him the with, quote, earlier or greater access to the materials
16 than the rules of whichever proceeding, whether federal or
17 criminal rules or military commission rules, would provide.
18 Again, that has to be viewed in somewhat in the context of the
19 sense that his defense team, although we can't use those
20 materials, has seen some, albeit not all, the materials in the
21 past.

22 But their claim is that's an illogical argument for us
23 to make because this would be to the world. But the world
24 doesn't gain anything by earlier or greater access. That
25 argument is completely out of context and just doesn't work.

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1 And it can't be that any time somebody gets access to materials
2 that would not be allowable under the appropriate rules of
3 criminal procedure, whether for the military or in civilian
4 courts, it necessarily means that there's an interference with
5 law enforcement proceedings. This Court has to assess whether
6 the release of these materials, insofar as they have been
7 described to you, would have that specific harm and how.

8 Finally, there's a good deal of argument in the papers
9 with regard to whether in the context of evaluating an
10 exemption 7(a) claim you can also consider the national
11 security arguments that were made under exemption one. We
12 believe that that argument is precluded by the Second Circuit's
13 decision in *ACLU v. DOD*. But even if it isn't, you heard our
14 arguments as to why those particular national security claims
15 don't pass the logic and plausibility tests.

16 Your Honor, there obviously are other arguments made
17 with regard to privacy with regard to Glomar. I think with
18 regard to those we don't think there's anything new in the
19 final submission, so we rely on our papers. And I appreciate
20 your Honor taking the time to hear me out this morning.

21 THE COURT: Now for the sur surreply.

22 MS. DAUGHTRY: Good morning, your Honor, Emily
23 Daughtry, assistant United States attorney representing the
24 government in this case.

25 Your Honor, I want to respond to focus my comments on

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1 the comments that Mr. Lustberg made, but I would just start by
2 noting for the Court that all of the videotapes and photographs
3 in this case are being withheld under exemption one and
4 exemption six, a subset of them are being withheld under
5 exemption 7(a), and that is just the 53 FBI videotapes. Those
6 are the only one that we're relying on exemption 7(a) for. So
7 what that means, of course, is if the Court finds for the
8 government on exemption one, then you need not reach exemption
9 7(a) or 6, same for exemption 6.

10 So with respect to the harms that are laid out in the
11 government's declarations, Mr. Lustberg has laid out the Second
12 Circuit standard, I think we all agreed on it, is whether the
13 harms are logical or plausible. And what that means is not
14 whether the plaintiff agrees with them, it doesn't necessarily
15 mean that the Court, in making an initial determination, would
16 also come to the same conclusions about the harm to national
17 security, what it means is: Has the government articulated a
18 harm to national security? The government, the executive
19 branch, which is uniquely qualified and placed to make
20 determinations about national security, has the government
21 articulated a logical or plausible explanation for the harm to
22 national security?

23 And here we have four separate declarations, three of
24 them submitted publicly, one ex parte, that describe these
25 harms, and each explanation of harm in these declarations

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1 provides an independent reason that exemption one applies. And
2 each explanation alone, we would submit, is sufficient to
3 uphold the government's assertion of exemption one. And these
4 are not only logical and plausible, but indeed compelling. And
5 I will go through and maybe address some of the points that
6 opposing counsel pointed out.

7 So with respect to the declarations submitted by
8 Admiral Woods, this is the declaration where Admiral Woods
9 essentially laid out that there is a harm to national security
10 from the release of detainee photographs, because detainee
11 photographs tend to show cooperation, and that cooperation in
12 turn can lead to reprisals, and those reprisals in turn can
13 lead to other detainees not being willing to speak with
14 government officials or have a chilling effect on cooperation
15 by other detainees, which in turn harm the government's ability
16 to collect intelligence.

17 And what I think is really key here is that the
18 government has this policy for classifying photographs because
19 there's a unique power to images that is different from a
20 written description. And images, as the Court in the *AP* case
21 which we cite in our brief noted, images have a power beyond
22 written description in that they can confirm the identity in a
23 way that a mere name even cannot, given that names can
24 sometimes be common, and they also just provide the type of
25 visceral proof that some people need in a way that written

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1 descriptions don't.

2 And I would point out that in addition to the AP case
3 there's another case in this district, the Azmy case, which has
4 also accepted this rationale. Indeed, in that case the court
5 upheld the government's withholding of an official
6 identification photograph of a detainee despite the fact that
7 that detainee's name was known and that other photographs of
8 that detainee had been released.

9 Another thing I also wanted to point out is counsel
10 mentioned there was no evidence of reprisals. There is in fact
11 in the Woods' declaration in paragraph 24, Admiral Woods
12 affirms that experience has shown that public disclosure of a
13 cooperative relationship between a source and the government
14 has indeed led to reprisals against the source. So this is not
15 a speculative concern, this is something that the original
16 classification authority in this case has made a judgment based
17 on past government experience.

18 In addition, with respect to the harms outlined in the
19 declarations submitted by General Horst, General Horst is the
20 chief of staff for the U.S. Central Command, recently retired,
21 I understand, but up until recently responsible for all of U.S.
22 military personnel in the Middle East and Central Asia,
23 including Afghanistan. And I think what is incorrect about
24 counsel's understanding of what General Horst said is that only
25 if the particular videotapes and photographs that are being

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1 withheld here showed some sort of abuse or mistreatment, then
2 that would be the only reason that this potential harm could
3 take place. And that is simply not the case, and that is not
4 what General Horst said.

5 The examples that he provided in his declaration show
6 also the general volatility of the region, but he does say
7 specifically in paragraph 12 that past experience has shown
8 that images of detainees interacting with DOD personnel have
9 incited violence and have led to situations that have even led
10 to the deaths of individuals. And so this, again, it is not
11 conclusory, it is not speculative, it is based on past
12 experience and it's the judgment of an original classification
13 authority which is responsible for the safety of those
14 individuals.

15 I would note that counsel also failed to mention
16 another assertion of harm that is in the Lietzau declaration.
17 William Lietzau was I think until recently the deputy assistant
18 secretary of defense for detainee policy. And another
19 explanation of harm that he provided in his declaration was
20 that the release of images and of detainees could lead to
21 unauthorized communications between detainees and others out in
22 the field. And indeed, this could include coded messages. And
23 he specifically says that detainees have attempted to
24 communicate with Al Qaeda in the past. And this is not based
25 on speculation, this is based on past experience.

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1 And I would also note that a district court in the
2 district of DC in the ICB case accepted both his rationale and
3 the rationale provided in General Horst's declaration in
4 upholding the government's withholding of videotapes of
5 detainees. In that case, specifically in that case there were
6 videotapes of forced cell extractions.

7 In addition, Mr. Lietzau also outlined another harm to
8 national security that could come about from the release of
9 these videotapes and photographs, and that is that the
10 long-standing policy of the United States government is to
11 protect detainees from public curiosity consistent with the
12 Geneva Conventions. And to the extent that the government
13 releases these photographs, that could lead our allies and
14 partners to understand that we no longer are able to protect
15 detainee photographs consistent with the Geneva Conventions,
16 and that could have a negative effect on our foreign relations.
17 And that, as your Honor knows, is one of the bases for
18 classifying information as well, as it could have a negative
19 effect.

20 THE COURT: How did The New York Times get a
21 photograph of Mr. al Qahtani?

22 MS. DAUGHTRY: I don't know that, your Honor, but I do
23 know that the United States did not release that photograph.

24 With respect to the FCE videotapes in particular, I
25 would just note that in addition to the harm that is set forth

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1 in the Lietzau declaration, which I will come back to in a
2 second, that General Horst in his declaration also specifically
3 affirmed that the FCE -- the FCE videotapes would be
4 particularly likely to cause the types of harm that he outlines
5 in his declaration because they depict the forcible interaction
6 between the U.S. military and detainees. So the FCE videotapes
7 in particular have a particular power do this.

8 And with respect to counsel's concerns about the harms
9 outlined in the Lietzau declaration with respect to the FCE
10 videos, again, the standard is not whether counsel agrees with
11 it, the standard is whether it is logical or plausible. Is it
12 logical or plausible that detainees, knowing that videotapes of
13 these events will be released publicly, would want to show
14 their continued resistance to the United States by struggling
15 more, being more violent, and endangering both themselves and
16 DOD military personnel. An original classification authority
17 whose job it is to be in charge of the detainees at Guantanamo
18 have made the determination that is a concern, and that is
19 logical and plausible and deserves the Court's deference.

20 I think I have addressed all of the exemption one.
21 There is also the classified declaration that we submitted
22 which I just wanted to clarify -- I know if you looked at that
23 briefly today -- only addresses the harms from releasing the
24 two debriefing videotapes. Unless you have any particular
25 questions about exemption one, I can move on to exemption 7(a).

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1 THE COURT: You may move on.

2 MS. DAUGHTRY: So with respect to 7(a), I think it
3 would be useful to sort of back up for a minute and look at the
4 big picture and just remind the Court what exemption 7(a) is
5 designed to protect. And this is one of several exemptions for
6 law enforcement information, but it is the exemption that
7 protects an ongoing investigation before an investigation has
8 come to trial.

9 And that is the situation that we have here, and many
10 of the harms that we have outlined in other declarations and
11 discussed in our briefs are indeed exactly the type of harms
12 that this particular exemption was designed to protect against.
13 So for example, to the extent that counsel says that it
14 doesn't -- is not legitimate that the government would be
15 concerned about earlier or greater access to these
16 investigative materials than they might be entitled to in a
17 criminal trial or in a habeas proceedings, we would submit that
18 is in fact not the case. That is exactly what 7(a) is designed
19 to protect. That is why there is an exemption protecting
20 information in an open investigation that could be used at
21 trial. And the fact that they have seen some of these
22 materials is really irrelevant, because they have not seen all
23 of them. In fact, they asked for more in another case, in the
24 habeas case, and specifically said no, we're only going to give
25 you these particular materials.

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1 And I would just sort of emphasize again the examples
2 that we put forth in our brief, and that is that it is indeed
3 logical and plausible that given this particular case that
4 al Qaeda would try to argue that certain information that the
5 government might be trying to introduce at trial should be
6 suppressed based on his treatment or conditions of confinement,
7 and these particular videotapes would show him in his cell at
8 the very period in time which these interrogations were taking
9 place could be used as rebuttal evidence for impeachment
10 purposes and that it would be important. It is exactly one of
11 the harms that 7(a) is designed to protect against to prevent
12 early access to those materials so as to prevent witnesses
13 changing their testimony, tailoring their testimony to avoid
14 impeachment.

15 I do want to just again -- counsel didn't mention this
16 particular exemption, but very briefly also mention exemption
17 6, which is also being relied upon by the government here to
18 withhold all the materials at issue. The Second Circuit has
19 made clear that detainees at Guantanamo do have a privacy
20 interest. They have privacy interest in their images. What we
21 are talking about here are videos that include really intimate
22 and personal details of a detainee's life in his cell, and that
23 this is exactly the type of intrusive imagery that both the
24 exemption 6 is designed to protect against and also the Geneva
25 Conventions, and that the public interest, which we certainly

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1 acknowledge is real, is greatly outweighed in this case by the
2 individual's privacy interest in his own images.

3 I think the one other point that I would just mention
4 is again, very briefly, that with respect to the CIA's Glomar
5 response, we have also moved -- plaintiffs initially moved only
6 for partial summary judgment, we moved for summary judgment in
7 toto, including the CIA's Glomar response. I'm happy to answer
8 any questions about that, I didn't want to repeat information
9 in our briefs.

10 Thank you, your Honor.

11 MR. LUSTBERG: Sur sur surreply?

12 Got it. Very briefly, I just wanted to address a
13 couple of points. One point that the government makes is this
14 issue of the fact that pictures have unique power. Obviously,
15 we don't disagree with that. I mean it's been part of our
16 American lexicon that a picture is worth a thousand words. But
17 the Court's job in this case is to look at these particular
18 images to see whether they satisfy these particular concerns,
19 and specifically whether these particular images give rise to
20 precisely the types of harms that the government is claiming
21 here.

22 It is true that generally pictures may have more
23 force, and perhaps even a greater ability to, let's say, foment
24 discord around the globe than a statement would be. That may
25 be true, but that is not enough. What your Honor has to do

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1 here is to parse these particular images to see whether they
2 satisfy the legal standard involved. It's not easy work, but,
3 as they say, that's what you're paid the big bucks to do.

4 Let me just say that in that regard unfortunately I
5 don't think you get a lot of help from the declarations that
6 the government has submitted. And so Ms. Daughtry has cited to
7 you, for example, the Woods' declaration, and specifically
8 paragraph 24 where he says experience has shown that
9 photographs of detainee interactions with DOD personnel have
10 caused certain reactions in terms of, I guess, that people will
11 cooperate thereafter, that sort of thing.

12 When I say "I guess," I guess because there's very
13 little detail there. I mean that is the type of conclusory
14 statement that we most respectfully submit -- I say
15 "respectfully" because it's wonderful to work with the
16 government in these cases, they do a great job, but that does
17 not -- that doesn't satisfy the legal standard and doesn't help
18 you to make your decision.

19 Likewise, when you look at the Horst declaration which
20 was submitted in the second round of declarations, Ms. Daughtry
21 points you to paragraph 12. And I understand what is there in
22 paragraph 12, and talks about that previously published
23 photographs of U.S. forces interacting with detainees have
24 incited violence. But I ask you to look at paragraph eleven,
25 which the context for paragraph twelve, and that's what I was

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1 arguing about before, that the types of interactions that
2 respectfully I think Admiral Horst was dealing with here were
3 the types of really inflammatory interactions that are not what
4 this case is about.

5 You can look at the images for yourself and make that
6 determination. When you do, if you determine to do an in
7 camera review, I think, although I don't know because I haven't
8 seen them, but based upon the government's representation,
9 which I take it at face value that they don't depict abuse, I
10 think that you will conclude that that standard is not met
11 either.

12 With regard to the Lietzau declaration, I did fail --
13 Ms. Daughtry is right, I failed to address the coded messages
14 argument. And it is true that ICB court accepted that
15 argument. I don't know precisely what the record that was made
16 there was or whether it included, for example, the information
17 that we have provided to you about the way that forced cell
18 extractions are done. But what I know is this, that your
19 Honor's job today is to engage in a segregation analysis. And
20 if you're concerned that the forced cell extraction videos
21 stand on different footing than the others, well, then so be
22 that.

23 But also the question is: Are there parts of it that
24 would not possibly give rise to that concern, the concern of
25 coded messaging? Well, the government says we would never know

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1 what the coded messaging might be in the future for cell
2 extractions, but if there is segregation that goes on, then
3 detainees who are thinking about using this sort of interaction
4 as code, as opposed to what they have to think about doing
5 knowing that this kind of thing was going to happen, if they
6 don't know when the segregation -- what segregation is going to
7 take place, it certainly undermines the effectiveness of any
8 such messaging.

9 Finally, I just want to briefly address the issue
10 about that -- again, that under exemption 7(a) that the concern
11 is that providing this information will give rise to the
12 opportunity to create rebuttal-type evidence. That's true of
13 any discovery in any case. And so I think it's the
14 government's obligation in a case like this to put some meat on
15 the bones and to explain to your Honor in declarations what the
16 specific concern is that could be done and by whom. It's the
17 government's job to show how this type of thing has happened
18 before with specificity so that your Honor can make a decision
19 on a record that is sufficiently complete to withstand judicial
20 review. That is what is missing here.

21 My final point is with regard to privacy, because it's
22 true I didn't address that. I think, again, we fully briefed
23 it in our papers, but the privacy concern is always a matter of
24 balancing on the one hand the public's right to know with all
25 the advantages for government accountability and transparency

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1 that are engendered thereby, and balance that against the
2 particular privacy concerns that one might have, whether under
3 the Geneva Conventions or otherwise. And again, I ask you to
4 look at the Geneva Convention argument carefully in light of
5 its logic and plausibility given the government's prior conduct
6 with this particular detainee.

7 But in any event, the intrusion on privacy, even if we
8 assume Mr. al Qahtani's consent was not knowing, has to be
9 based upon the particular images involved. So the question is:
10 Is there a particular privacy intrusion that comes about as a
11 result of looking at these videos, these particular 53 videos,
12 which is all -- because they claim privacy for all of them,
13 these particular mug shots, given all of what is out there in
14 the public sphere already, some of which is there as a result
15 of government action, not Mr. al Qahtani's image in particular,
16 but the images of detainees that are in the materials that we
17 provided to the Court. Because the government says when you
18 look at those images, they're not identifiable of any detainee.
19 I don't know that. There's some pretty clear images of
20 detainees in the images that the government made available to
21 the press and to the public over the years of people praying,
22 of people getting medical treatment, of people getting their
23 beards trimmed, those images are all in the materials that we
24 provided. All of that has to be factored in so this balancing
25 is not something that is done in a vacuum but is based upon a

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1 particular factual record assembled on both sides in this case.
2 And as I said I think at the outset, the Court is blessed in
3 this case with having a pretty complete factual record based on
4 the submissions of the parties.

5 Beyond that, I would be happy to answer any questions
6 that your Honor would have.

7 THE COURT: Do you have a need for the last word?

8 MS. DAUGHTRY: I don't think so, your Honor, although
9 if you have questions in particular about other images that the
10 government has released, I'm happy to address them.

11 THE COURT: I gather that plaintiff's counsel
12 accepts -- I gather from what he said that it's the
13 government's position that when you have released an image it
14 was not one that, in the government's view, could be identified
15 as a particular individual.

16 MS. DAUGHTRY: That's exactly right, your Honor. And
17 the exception to that is the policy of allowing the
18 International Committee for the Red Cross to take photographs
19 with the consent of detainees, and to provide those to the
20 detainee's families. And I sort of add it is not insignificant
21 in this case that al Qahtani has not consented to have his
22 photograph taken by the ICRC given to his family.

23 And a final thing to clarify, all of those images that
24 are taken by the ICRC before they are released to the families
25 are in fact reviewed by the Department of Defense to ensure

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1 that all the various harms that are outlined in our of all
2 declarations would not come to pass through the release of
3 those particular photographs.

4 MR. LUSTBERG: Well, if that's so, then that same sort
5 of searching analysis ought to be done with regard to these
6 particular images.

7 THE COURT: But here's the problem with your consent
8 argument, apart from the fact that there is none in the record,
9 is that even if there was a point in time when Mr. al Qahtani
10 was in better psychological shape, I'm assuming that what he
11 wanted -- assuming he gave the consent, what he wanted released
12 were images of him being tortured, not images, as the
13 government describes them, which don't show bad acts. And then
14 I think there's a great difference in what a detainee would
15 want released, in sort of abstractly trying to get into the
16 mind of someone being held at Guantanamo, and I really don't --
17 I think for many reasons the consent argument just doesn't
18 work.

19 MR. LUSTBERG: I wasn't -- I understand that's --
20 without conceding that point, because we think that there is
21 evidence of consent in this record, I understand the Court
22 discounts it. I think that there are, without getting into the
23 details of conversations with Mr. al Qahtani, he certainly was
24 aware that there was not -- that the images at issue here would
25 not necessarily be of torture. So that is just -- I mean

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1 that's -- I understand the Court's concern in that regard, but
2 either way, I don't think that -- what I'm saying is that that
3 is not the issue. The issue is that the Court has to look at
4 the images that are here and see whether they will result in
5 the specific harms that the government has identified. And
6 that really, at the end of the day, is the test. They have
7 said that these images will cause these harms. They have said
8 this Court must defer. We say that that deference is embodied
9 in the logic and plausibility standard, and that when you apply
10 that standard to these images, you don't come up with the
11 conclusion that every single one of them in their entirety
12 should be withheld. That is not a conclusion that could
13 logically or plausibly result from these particular concerns
14 irrespective of the consent issue.

15 MS. DAUGHTRY: One very small point of clarification
16 is that the standard is not that the government must show that
17 it's logical and plausible that these harms must occur, the
18 standard is the government has to show that it is logical or
19 plausible that the harms could reasonably be expected to occur.
20 And that is, of course, a predictive assessment.

21 MR. LUSTBERG: We accept that.

22 THE COURT: OK. Thank you very much.

23 MS. LaMORTE: Thank you.

24 MS. DAUGHTRY: Thank you, your Honor.

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